

Claimant was granted his request by the Administrative Law Judge for medical treatment and temporary total disability weekly benefits for a low back injury that he alleged occurred in a work-related accident on February 27, 1996. Claimant was employed by the respondent on February 27, 1996 to set forms and finish concrete. On the day of the accident, claimant was told by his immediate supervisor, Rick Smith, to clock out early at 2 p.m. because hours needed to be cut and it was cold.

While claimant was putting his tools away, John Moses, a foreman employed by the respondent, who had supervisory responsibilities over both the claimant and Rick Smith, arrived at the job site. The evidentiary record established that Mr. Moses is a large man about 6 feet 2 inches tall, weighing approximately 300 pounds. In contrast, claimant weighs 155 pounds. Claimant testified that Mr. Moses immediately walked up to him and, for reasons not explained in the record, punched him in the chest and slapped him in the face. Thereafter, Mr. Moses ordered claimant to get a saw out of his truck for Mr. Smith. Claimant testified that he told Mr. Moses he was off the clock but he went ahead and removed the saw as instructed. Claimant then asked Mr. Smith what time he needed to come in the next day as he did not have a telephone. While claimant was talking to Mr. Smith, Mr. Moses made a comment to the claimant "oh, you're off the clock," and proceeded to pick claimant up and slammed him into the back of the truck.

Claimant immediately experienced a sharp pain in his low back that worsened as he was driving home. He contacted the respondent about the pain and was authorized to seek treatment at a minor emergency treatment clinic. The doctor at the emergency clinic took claimant off work and then referred him to Robert L. Eyster, M.D., an orthopedic surgeon in Wichita, Kansas. Dr. Eyster saw claimant on March 5, 1996 and diagnosed lumbar strain with a possible bulging disc. Claimant was taken off work by Dr. Eyster. Dr. Eyster again saw claimant on April 18, 1996 releasing him for work with restrictions of no lifting over 20 pounds and no forward bending. At the time of the preliminary hearing, claimant had not returned to work.

Respondent argued that claimant's low back injury did not arise out of and in the course of his employment with the respondent. Respondent contended since claimant was off the clock when he was injured, his injury did not occur at work. Respondent further argued that claimant's injury did not arise out of his employment because he was a willing participant in horseplay, which was not tolerated by the respondent. The Appeals Board disagrees with respondent's arguments.

The Appeals Board finds the preliminary hearing record established that claimant was injured while he remained on the job site of the respondent. Claimant's injury happened while he was working for the respondent as his supervisors continued to instruct him to perform work activities; e.g., Mr. Moses instructed claimant to remove a saw from his truck. The Appeals Board also finds that there is no evidence that claimant was a willing participant in the contact that occurred between him and Mr. Moses which would constitute horseplay. Furthermore, the Appeals Board finds the respondent cannot raise horseplay as a defense when a supervisor who would be responsible for enforcing a rule against horseplay was the one who initiated the physical contact with the claimant.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge John D. Clark dated April 23, 1996 should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1996.

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BOARD MEMBER

c: Gregory K. Barker, Wichita, KS  
Edward D. Heath, Jr., Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director